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IN THE

# Supreme Court of the United States

October Term 1982

FREDERICK A. WEIN,
INDIVIDUALLY AND AS A REPRESENTATIVE OF A
CLASS OF OTHERS SIMILARLY SITUATED,
*Petitioner,*

vs.

COMMITTEE OF BAR EXAMINERS OF
THE STATE BAR OF CALIFORNIA
AND THE STATE BAR OF CALIFORNIA,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

HERBERT M. ROSENTHAL
555 Franklin Street
San Francisco, California 94102
(415) 561-8200

ROBERT M. SWEET
1230 West Third Street
Los Angeles, California 90017
(213) 482-8220

*Attorneys for Respondent*

## QUESTIONS PRESENTED*

1. Whether in the instant action by one who failed the California bar examination and then moved to Illinois,

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* The district court dismissed petitioner's second amended complaint solely on the basis of lack of personal jurisdiction, and for that reason did not reach the other grounds asserted in respondent's motion to dismiss (i.e., lack of subject matter jurisdiction, Eleventh Amendment damages immunity, quasi-judicial damages immunity, failure to state a claim, and noncompliance with Federal Rules of Civil Procedure 8, 9, 10 and 23). It is submitted that the Court of Appeals properly concluded that because the appeal was from a dismissal for lack of personal jurisdiction, the remaining issues addressed in petitioner's briefs on appeal (being the other grounds originally asserted for dismissal) were not properly before the court. Indeed, if the lower court lacked personal jurisdiction, any judgment on the remaining issues would be void. See Worldwide Volkswagon v. Woodson, 444 U.S. 286, 291, 100 S.Ct. 559, 564 (1980), citing Pennoyer v. Neff, 95 U.S. 114, 132-133, 24 L.Ed. 565 (1878). It is respectfully submitted that personal jurisdiction and the subsidiary discovery issue related thereto are the only issues properly before this Court and that therefore this Court as well should decline petitioner's invitation to address the many other issues raised in his petition.

the district court for the Northern District of Illinois (Eastern Division) and the Court of Appeals for the Seventh Circuit correctly determined that the applicable standard to utilize in determining whether personal jurisdiction had been obtained over respondent State Bar of California and its component Committee of Bar Examiners as to any or all of petitioner's alleged claims for relief (i.e., federal civil rights and antitrust, and state law diversity claims) was the minimum-contacts-with-the-forum-state standard of International Shoe and its progeny, since petitioner elected to effect service of process solely under the second sentence of Fed.R.Civ.P. 4(e), utilizing the Illinois long arm statute, and disclaimed any intent to utilize a federal statute providing for nationwide service of process as to antitrust claims (i.e. 15 U.S.C. § 22).

2. Whether the district court and the Court of Appeals correctly applied such minimum contacts standard in determining that respondent State Bar of California had insufficient contacts with Illinois to justify the assertion of personal jurisdiction consistent with "due process" concepts inherent in the minimum contacts formulation.

3. Whether the Court of Appeals correctly determined that the district court had not abused its discretion in concluding that before it had reached its decision concerning the lack of personal jurisdiction, petitioner had been afforded adequate opportunity to engage in discovery relevant to the issue of personal jurisdiction.

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# RESPONDENT'S BRIEF IN OPPOSITION

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Respondent respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's order (opinion) in this case. That order, dated June 29, 1982, is unreported. (A typewritten copy is attached to the petition for

writ of certiorari as Appendix A; and for ease of reference, a photocopy of the original opinion is attached to this brief as an appendix.)

## I

## COUNTERSTATEMENT OF THE CASE

This case arises out of petitioner's unsuccessful attempt to pass the July 1980 administration of the California bar examination as an attorney applicant for admission to practice law in California. At the time he took the examination, petitioner was a resident of California, but sometime thereafter he travelled to Illinois where he took up residence and filed the instant combined diversity and federal question (i.e., civil rights and antitrust) action against respondent the State Bar of California ("respondent") and its component Committee of Bar Examiners

("Committee") on behalf of himself and an alleged class consisting of all others who failed the examination. The action was filed in the United States District Court for the Northern District of Illinois, Eastern Division.

Plaintiff's second amended complaint in the action alleges in part that respondent's Committee "engaged in fraudulent, dishonest, and improper grading of the essay portion of the examination in breach of contract, by fraud, misrepresentation, deception, and false promise in order to restrict and keep down the number of applicants passing the examination . . . " The prayer is for injunctive relief establishing revised grading criteria for the California bar examination and a declaration that (apparently) all those who failed the examination be instead deemed to have passed; and for

compensatory, punitive and treble damages.

Plaintiff's second amended complaint was ultimately dismissed by the federal district court in Illinois pursuant to Fed.R.Civ.P. 12(b)(2), for lack of jurisdiction over the person of respondent. On appeal, the district court's judgment of dismissal was affirmed by the United States Court of Appeals for the Seventh Circuit; and petitioner's petition for rehearing and suggestion for hearing in banc was denied.

As is revealed by petitioner's second amended complaint and affidavits, discovery and other documents filed in the district court relative to the issue of personal jurisdiction, the State Bar of California (i.e., respondent) is a public corporation in the judicial branch of government of the State of California

which acts as the administrative arm of the Supreme Court of California, inter alia, in all matters relating to the admission of attorneys to practice law in California. Through its Committee, respondent administers the statutory requirements to be certified to the Supreme Court of California for admission to practice law, which requirements include passage of the California General Bar Examination or the California attorneys' examination.

Respondent maintains offices only in Los Angeles and San Francisco, California. Respondent has no officers, employees, agents, office or place of business in Illinois, and has not appointed an agent for service of process there. Respondent does not send employees or agents to Illinois or other states for any purpose other than attendance at periodic professional

seminars and educational meetings.* Moreover, respondent has no assets, bank accounts or real or personal property in Illinois; it does not advertise for or solicit bar applications in Illinois and it is not listed in any telephone directory in that state.

Respondent requires that its members maintain a current address, but it does not require that its members maintain a California mailing address. Respondent's records reflect that on April 10, 1981, it had 71,495 members, 4,170 of whom maintained mailing

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* Members of respondent's Committee of Bar Examiners have attended seminars and instructional meetings and conferences in Illinois and many other states over the years, chiefly sponsored by or in conjunction with meetings of the American Bar Association ("ABA") and the National Conference of Bar Examiners, an ABA affiliate from which respondent's Committee obtains moral character information relative to out-of-state applicants.

addresses outside of California, approximately 413 of those in Illinois.

The respondent mails the following to its members, wherever they may reside, according to their current address as reflected in respondent's records: (a) annual membership fee statements; (b) if membership fees are not timely paid, notices of penalties for late payment and notices of suspension for nonpayment; (c) copies of disciplinary orders entered by the Supreme Court of California; (d) the State Bar magazine. The Committee does not list the dates of the California bar examination in any national publication, although others such as law schools and bar preparation courses do.

According to petitioner's second amended complaint, petitioner was admitted to practice law in Illinois in 1974 and for at least four of the six

years preceding the July 1980 administration of the California bar examination, had practiced law in Illinois and other jurisdictions. Petitioner presently is a resident of Cook County, Illinois.

On April 1, 1980, petitioner filed with the Committee in California an attorney application for admission to practice law in California. Petitioner's application reflected a mailing address of China Lake, California, and in the application petitioner represented that he was and had been a resident of California since January 1980. The Committee's examination registration materials were mailed to petitioner at the China Lake, California, address.

Attorneys and general applicants from any state can apply to take the California bar examination without regard to citizenship. General applicants must take the General Bar Examination, which

at the time consisted primarily of a one-and-one-half-day essay section of nine questions and a one-day multiple choice question section (i.e. the Multistate Bar Examination or "MBE"). The essay section is prepared, administered and graded by the Committee, while the MBE is prepared and graded by Educational Testing Service but administered in California by the Committee.

Attorney applicants (such as petitioner) who have been admitted to practice in another state and who have been actively engaged in the practice of law for four of the six years immediately preceding the administration of the California bar examination for which they apply may elect to take the General Bar Examination (i.e., both the MBE and essay sections) or the attorneys'

examination, which consists of the essay section of the general examination only.

As indicated, petitioner sat for the July 1980 California attorneys' examination. Sometime after the essay answers were graded the Committee mailed a notice to petitioner advising him that he had failed. In accordance with a notice of change of address received from petitioner after the examination, notification of the results was mailed to petitioner at 600 Laramie Avenue, Wilmette, Illinois. With the notice there was sent to petitioner (and to all others who failed the examination no matter where they resided) an application form for the next examination.*

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* Usually there are only about two weeks between the time the results of the examination are mailed and the date to timely file an application for the next bar examination.

The Committee's available records for the nine bar examinations given in California during the period July 1976 through July 1980 indicate that 401 general and attorney applicants who had a last known current address in Illinois or a permanent address in Illinois both applied for and took one or more of these examinations.

Petitioner's original complaint in this action was filed on March 10, 1981. At the same time petitioner filed and served a first set of interrogatories, Nos. 1 through 5. Summons on the original complaint was personally served by a federal marshal in California on March 19, 1981, by delivering copies to employees of respondent there. However, on March 17, 1981, before the original complaint was served by the federal marshal, plaintiff voluntarily filed an amended complaint, which was "served" by

mailing a copy by first class mail to respondent's San Francisco, California, office.

On April 15, 1981, respondent served and mailed for filing a motion to dismiss petitioner's amended complaint pursuant to Fed.R.Civ.P. 12(b), on the grounds of failure to obtain personal jurisdiction, failure to establish subject matter jurisdiction, that petitioner's claims for damages were barred by the Eleventh Amendment, that respondent was clothed with judicial immunity from damage awards in performing its bar admissions functions and that the complaint failed to otherwise state claims upon which relief could be granted because petitioner had not alleged sufficient facts (as distinguished from vague, conclusory assertions) to satisfy the requirements of Fed.R.Civ.P. 8, 9(b) and 10. Also on

April 15, 1981, respondent served and mailed for filing partial answers and objections to plaintiff's first set of interrogatories. An amended answer and objection to interrogatory No. 5 of the first set was filed on April 27, 1981.

Subsequently, the district court dismissed petitioner's amended complaint with leave to amend, for failure to comply with Fed.R.Civ.P. 8, 9, 10 and 23, the court indicating that respondent need not file another motion to dismiss and that it would consider respondent's jurisdictional arguments when petitioner filed a further amended pleading. (Petition, p. A36.)

On May 29, 1981, petitioner filed a second amended complaint, which also was served by first class mail addressed to one of respondent's attorneys at its offices in San Francisco, California. In his second amended complaint,

petitioner alleged that the United States District Court for the Northern District of Illinois (Eastern Division) obtained personal and subject matter (i.e. substantive) jurisdiction of respondent and its component Committee of Bar Examiners under 15 U.S.C. § 4 (Sherman Act); 28 U.S.C. §§ 1331 (federal question), § 1332 (diversity), § 1337 (interstate commerce and anti-trust), § 1343(3) (civil rights), Fed.R.Civ.P. 4(e); Ill.Rev.Stat. Chapter 110, sections 16-18 (the Illinois long arm statute),* and ancillary and pendant jurisdiction. Petitioner's second amended complaint contains 12 alleged

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* Specifically, petitioner asserts that the district court obtained personal jurisdiction over respondent through service of process effected pursuant to subsections (a) (transaction of business in Illinois) and (b) (commission of tortious act in Illinois) of section 17, Chapter 110, Ill.Rev.Stat.

causes of action, briefly summarized as follows: violation of the antitrust laws (count 1); civil rights violations under 42 U.S.C. § 1983 and § 1985 (counts 2 and 3); violation of plaintiff's rights under the equal protection clause, the due process and privileges and immunities clauses of the United States Constitution (counts 4 through 7); and state causes of action for unjust enrichment, intentional infliction of emotional distress, misrepresentation, fraud, and breach of contract (counts 8 through 12).

In his second amended complaint, petitioner alleged in essence that in order to minimize competition with those already admitted to practice in California and to acquire additional income from repeat takers of the bar examinations, the Committee maintains an artificially low passing rate ("typically

less than 50%") through fraudulent grading practices and procedures, misrepresenting to applicants for admission that on every question comprising the essay section of the California bar examination it is possible to obtain a maximum grade of 100 while in fact the highest grade obtainable from the Committee is 70, the minimum possible passing grade. Petitioner prayed for relief in the form of a retrospective order from the federal district court in Illinois establishing revised grading criteria to be applied by the Committee* relative (apparently) to the July 1980 administration of the California examination together with a "declaration" that

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* The Committee acts only as the administrative arm of the Supreme Court of California in matters relating to admission to practice law in California. The plaintiff has not named or served the Supreme Court Justices.

petitioner and all other unsuccessful examinees instead passed the essay portion of the examination under such revised grading procedures and therefore must be certified to the California Supreme Court for admission to practice law in California. Petitioner also sought a prospective order that respondent "be permanently enjoined from conducting future bar examinations in the manner complained of herein." And finally, petitioner prayed for a retroactive award of "unspecified" compensatory and punitive damages, threefold damages and attorneys' fees under 15 U.S.C. § 15 and attorneys' fees and costs under 42 U.S.C. § 1988.

As indicated, the federal district court in Illinois dismissed the petitioner's second amended complaint under Fed.R.Civ.P. 12(b)(2), for lack of jurisdiction over the person of

respondent, the district court also concluding that in these circumstances it was "unnecessary and possibly improper" to address the other grounds for dismissal advanced in respondent's motion. (See petition, pp. A21-A33.) A motion for reconsideration was denied by the district court. (Petition, pp. A34-A35.) In its order (opinion) affirming the district court's judgment of dismissal (petition, pp. A1-18, A20), the Court of Appeals for the Seventh Circuit likewise concluded that since petitioner's appeal was from a dismissal for lack of personal jurisdiction, "the remaining issues in [petitioner's] brief, e.g. subject matter jurisdiction, sufficiency of his claims, etc. are not properly before this court." (Petition, p. A21 n.5.)

Petitioner timely filed the instant petition for writ of certiorari, seeking

review of the Court of Appeal's decision pursuant to Rule 17, Rules of the Supreme Court of the United States.

## II

## REASONS WHY THE WRIT SHOULD BE DENIED

### A. SINCE PETITIONER EXPRESSLY ELECTED NOT TO UTILIZE A FEDERAL STATUTE PROVIDING FOR NATIONWIDE SERVICE OF PROCESS AS TO HIS ONE ANTITRUST CLAIM, PERSONAL JURISDICTION AS TO ALL PETITIONER'S CLAIMS (i.e. DIVERSITY AND NONDIVERSITY) IS LIMITED TO THAT WHICH MAY BE OBTAINED UNDER THE ILLINOIS LONG ARM STATUTE USED BY PETITIONER

Petitioner asserts that federal district courts may assert nationwide personal jurisdiction in any case involving a federal question as long as the defendant has minimum contacts with the United States. (Petition, pp. i, 3-4, 16.) While this proposition is true where there is a federal statute

providing for such nationwide service, absent such a statute federal district courts are subject to the same minimum-contacts-with-the-forum-state standard as are state courts when service is attempted on nonresidents pursuant to a state long-arm statute. See, e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, 50 U.S.L.W. 4553, 4558 (1982) (Powell, J. concurring); Stafford v. Briggs, 444 U.S. 527, 554, 100 S.Ct. 774, 789 (1980) (Stewart, J. dissenting); Mississippi Pub. Co. v. Murphree, 326 U.S. 438, 444-445, 66 S.Ct. 242 (1946); Haile v. Henderson Nat. Bank, 657 F.2d 816, 826 n.10 (6th Cir. 1981); Fitzsimmons v. Barton, 589 F.2d 330, 332-333 (7th Cir. 1979); Driver v. Helms, 557 F.2d 147, 155-156 (1st Cir. 1978), rev'd on other grounds sub nom., Stafford v. Briggs, 444 U.S. 527, 100 S.Ct. 774 (1980);

Black v. Acme Markets, Inc., 564 F.2d 681, 683-686 and 686 n.8 (7th Cir. 1979); 2 J. Moore Federal Practice ¶ 4.32[1], pp. 4-343 to 4-344; ¶ 4.32[2], pp. 4-348, 4-352 (2nd ed. 1981); 4 C. Wright & A. Miller Federal Practices and Procedures, § 1075, p. 302 n.25 (1969); Notes, 61 B.U.L.Rev. 403 n.3 (1981). And see also Great Western United Corp. v. Kidwell, 557 F.2d 1256 (5th Cir. 1978), rev'd on other grounds sub nom., Leroy v. Great Western United Corp., 443 U.S. 173, 99 S.Ct. 2710 (1979). Petitioner served process using the Illinois long arm statute as permitted under Fed.R.Civ.P. 4(e), second sentence.* While the anti-trust statutes do provide for nationwide service of process (15 U.S.C. § 22) petitioner expressly admits that he

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* Petitioner's complaint included a claim based on the antitrust statutes.

elected not to use this provision, and as is noted in the penultimate paragraph of the Advisory Committee's comment concerning the 1963 amendment of Rule 4(e), "[i]f the circumstances of a particular case satisfy the applicable Federal law (first sentence of Rule 4(e), as amended) and the applicable State law (second sentence) the party seeking to make the service may proceed under the Federal or the State law, at his option." (Emphasis added.)*

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* It is unlikely that petitioner could have served process under 15 U.S.C. § 22 had he attempted to do so. Aside from the fact that the State Bar of California is not a private corporation, venue in an antitrust case is proper "only in the judicial district where all defendants reside, or in which the claim arose" (28 U.S.C. § 1391(b)), or where the defendant "may be found or transacts business" (15 U.S.C. § 22). Petitioner has never contended that the alleged antitrust activites took place elsewhere than California. Since the standard "may be found or transacts business" requires at least as much contact with the forum venue (not the

Although petitioner attached 13 pages of his reply brief to the Seventh Circuit as part of Appendix A to his petition (pp. A72-A85), he omitted a

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entire state) as the traditional minimum contacts standard, venue under the antitrust act is proper only if personal jurisdiction could otherwise be established. Chromium Industries v. Mirror Polishing & Plating Co., Inc., 448 F.Supp. 544, 551 (N.D.Ill. 1978). It has also been held that venue under 15 U.S.C. § 22 is improper in a district in which the plaintiff has suffered no injury. Wood v. Santa Barbara Chamber of Commerce, Inc., 507 F.Supp. 1128, 1141 (D.Nev. 1980). Plaintiff's complaint is about the alleged fraudulent grading of his essays in California and his resultant inability to practice there, not in Illinois.

Where antitrust venue is improper, service of process under 15 U.S.C. § 22 has been held to be invalid. Athletes Foot of Delaware v. Ralph Libonati Co., Inc., 445 F.Supp. 35, 45 (D.Del. 1977) ("service beyond state boundaries is authorized only when there is proper venue."); Chromium Industries, supra, 448 F.Supp. at 550; Friends of Animals, Inc. v. Am. Veterinary Medical Ass'n, 310 F.Supp. 620, 624 (S.D.N.Y. 1970); Pocahontas Supreme Coal Co. v. National Mines Corp., 90 F.R.D. 67, 72 (S.D.N.Y. 1981); Wood v. Santa Barbara, supra, 507 F.Supp. at 1140-1141.

portion in which he expressly disclaimed use of 15 U.S.C. § 22, as follows:

> "Plaintiff was fully aware of the nationwide service under 15 USC 22 as previously shown hereinabove. However, because of fear of possible complications under the Illinois Long-Arm Statute, Chapter 110, Section 17(3) which states:
>
> "'Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this Section.'
>
> "Plaintiff was fearful that service under 15 USC 22 might be construed as violating this provision of the long-arm statute and accordingly, the complaint does not cite such as basis for jurisdiction. However, plaintiff still has the right to serve defendant in other actions in any way available, including institution of other actions in Illinois and California." (Petitioner's reply brief before the Seventh Circuit, p. 9.)

In addition, at oral argument before the Court of Appeals petitioner expressly disavowed any reliance on 15 U.S.C. § 22 or any other federal statute providing for nationwide service of process. (See footnote 5 to the court's opinion; petition, p. A5.*) Thus the question narrows to whether absent a federal statute providing for nationwide service of process a federal district court in a combined federal question and diversity case may utilize a state long arm statute to obtain personal jurisdiction over a defendant who has minimum contacts with the United States but not

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* In view of this admission, petitioner's statement that this issue "was ignored by the Court of Appeals" (petition, p. 1) is obviously incorrect. Since petitioner affirmatively opted not to use the only federal statute providing for nationwide service of process even arguably available to him, the issue was not properly before the court below.

with the forum state. Viewed in this context the cases relied upon by petitioner are readily distinguishable since all involve a federal statute authorizing nationwide service of process, and thus the "conflict" between the circuits alleged by petitioner does not exist.

Petitioner cites F.T.C. v. Jim Walter Corp., 651 F.2d 251 (5th Cir. 1981), as one case which is allegedly inconsistent with the decision of the Court of Appeals below and claims that the case holds "that the federal courts have nationwide jurisdiction in federal question cases." Petition, p. 1. In Jim Walter Corp. the F.T.C., as a result of complaints by consumers in Texas and adjacent states, had initiated a multi-state investigation of the Jim Walter Corporation, a Florida-based holding company providing "corporate services"

for several wholly owned subsidiaries engaged in the construction and marketing of new homes. One subsidiary, Jim Walter Homes, Inc., was engaged in building and selling homes throughout the South and Southwest, and had twenty offices in Texas, including one in Dallas.

The F.T.C. issued an investigatory subpoena duces tecum from 'ts office in Dallas which was served on the Florida office of Jim Walter corporation. When Jim Walter refused to comply the F.T.C. brought a summary order to show cause proceeding to enforce the subpoena in the northern district of Texas.

Jim Walter Corp. objected to the assertion of "personal jurisdiction" by the federal district court in Texas on the ground, among others, that since it allegedly transacted no business in the northern district of Texas the federal

court lacked a constitutional basis for exercising personal jurisdiction consistent with the due process clause.

In affirming the district court, the Fifth Circuit first held that section 9 of the Federal Trade Commission Act (15 U.S.C. § 49) implicitly authorizes nationwide service of process. In reaching this conclusion the panel relied primarily on F.T.C. v. Browning, 435 F.2d 96 (D.C.Cir. 1970), where the court concluded in essence that in enacting the Federal Trade Commission Act empowering the F.T.C. to conduct nationwide investigations expressly utilizing subpoenas for the attendance of witnesses and the production of documents "from any place in the United States," it would have been antithetical for Congress not also to have intended that there be nationwide service of process, especially since Congress had

limited venue in enforcement actions to only the federal district court "within the jurisdiction of which" such nationwide inquiry was being held. (15 U.S.C. § 49.)*

In view of this determination of the court in Jim Walter Corp. that 15 U.S.C. § 49 authorizes nationwide service of process, the constitutional portion of the opinion takes on a different focus. Thus when the court stated in part II.C of the opinion that: "[s]ubject only to the regulation of Congress, each federal court exercises the 'judicial power of the United States,' not a judicial power constitutionally limited by the boundaries of a particular district" and "[b]ecause the district court's

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* It should also be noted that Fed.R.Civ.P. 4(f) limits extraterritorial service of process "other than a subpoena."

jurisdiction is always potentially, and in this case actually, coextensive with the boundaries of the United States, due process requires only that a defendant in a federal suit have minimum contacts with the United States" (emphasis in original; footnote omitted)--the court in Jim Walter Corp. clearly was speaking only of a situation where lower federal courts created by Congress are freed from the usual territorial restraints of Fed.R.Civ.P. 4(f) because Congress has acted to eliminate those restraints by authorizing nationwide service of process. That the court recognized that this was the situation is clearly shown by footnote 9 of the opinion, 621 F.2d at 256.

The other cases relied upon by petitioner, Fitzsimmons v. Barton, 589 F.2d 330 (7th Cir., 1979), and Driver v. Helms, 577 F.2d 147 (1st Cir. 1978),

rev'd on other grounds sub nom., Stafford v. Briggs, 444 U.S. 527, 100 S.Ct. 774, 785 (1980), also involved a federal statute providing for nationwide service of process and also noted the distinction. (See Fitzsimmons at 589 F.2d 332, 333; Driver v. Helms at 577 F.2d 155, esp. n.23, 156.)

Thus the claimed conflict is actually a principled distinction based on the presence or absence of a federal statute authorizing nationwide service of process. Since there is no conflict and the cases have uniformly agreed with the position of the court of appeals below, the only real question is whether, under the traditional minimum-contacts-with-the-forum state analysis, the district court in Illinois obtained personal jurisdiction over respondent.

B. THE COURTS BELOW PROPERLY DISMISSED THE COMPLAINT FOR LACK OF PERSONAL JURISDICTION. THE UNDISPUTED FACTS DEMONSTRATE THAT THERE ARE NO "MINIMUM CONTACTS" WITH ILLINOIS WHICH WOULD MAKE IT FAIR AND REASONABLE TO REQUIRE RESPONDENT TO CONDUCT ITS DEFENSE IN THAT STATE

It has been demonstrated that since plaintiff did not utilize any federal statute providing for nationwide service of process, his attempt to effect service utilizing the Illinois long arm statute is limited by the traditional minimum-contacts-with-the-forum-state standard of International Shoe and its progeny. Under this standard respondent lacks sufficient contact with the state of Illinois to allow a finding of personal jurisdiction in Illinois consistent with due process.

Little can be added to the excellent analysis of this issue in the opinion of the Seventh Circuit (petition, pp. A1-

A33); a few points do, however, deserve emphasis and a brief explanation.

1. The Presence of Offices of Califonia Tax Agencies in Chicago Is Not a Contact of the State Bar.

Petitioner several times mentions that two tax agencies of the State of California (i.e., the State Board of Equalization and the State Franchise Tax Board) have offices in Chicago. Petitioner argues in essence that this presence or "contact" of two California executive branch tax agencies is attributable for minimum contacts analysis purposes to respondent State Bar, an unrelated and independent agency in the judicial branch of California government.

It seems questionable at best whether the presence of these offices in Chicago would allow an assertion of

personal jurisdiction over even the two tax agencies, since their only purpose in Chicago is to collect taxes owed by those who have done business in California. Moreover, since these are executive branch agencies their contacts with Illinois are irrelevant to respondent, an agency in the judicial branch of state government which acts as the administrative arm of the Supreme Court of California in admission matters. See Counterstatement of the Case, supra. As the Seventh Circuit observed in its order:

> "The State Bar, as an entity, is expressly amenable to suit. Cal. Bus. & Prof. Code § 6001. Clearly that entity--not the state --is the focus of the plaintiff's allegations. Accordingly, the plaintiff must demonstrate that the entity which it can and is attempting to sue has 'minimum contacts' with the forum." (Petition, A10 n.9.)

A close analogy would be to compare the state of California and its agencies with a corporation and its subsidiaries. Cases have uniformly held that contacts by one subsidiary (e.g. the tax boards) do not allow an extension of personal jurisdiction over either the parent (California) or another subsidiary (respondent), absent actual daily control and direction. See Restatement (Second) Conflict of Law, § 52, comment b (1971); Uston v. Hilton Casinos, Inc., 564 F.2d 1218, 1219 (9th Cir. 1977); Oddi v. Mariner-Denver, Inc., 461 F.Supp. 306, 310 (S.D.Ind. 1978).

2. Attendance at Occasional Meetings and Seminars in Chicago Is Not a Business Contact.

An Affidavit attached to respondent's motion to dismiss stated in part that State Bar employees attend occasional professional meetings and seminars in

Chicago. While the appeal was pending, petitioner read about periodic meetings of bar examiners from the several states sponsored by the National Conference of Bar Examiners in Chicago, which petitioner brought to the attention of the court below through an appellate level "discovery motion."* (Petition, pp. A62-A71.)

In this connection, it should also be emphasized that the purpose of attendance at these meetings is not to transact or discuss business in Illinois

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* Respondent did not reply to petitioner's "Motion to Supplement the Record on Appeal, and Motion to Compel Discovery . . . " since it found no authority providing for either the motion or a reply. Nevertheless, the Seventh Circuit granted petitioner's motion in part "to the extent that we consider plaintiff's additional allegations." (Petition, p. A8 n.8.) The court below did deny an alternative request for issuance of a subpoena directed to the National Conference of Bar Examiners in Chicago. (Petition, p. A8 n.8.)

but merely to improve professional competence and ability of the volunteer members of the Committee to administer the statutory requirements for admission in California, including the bar examinations administered there.

3. The California Bar Examination Is Not Given in Illinois or in Any State Other Than California.

Before both the district court and the court of appeals, petitioner asserted that 40 percent of the California bar examination is given in Illinois, although he was corrected each time. He has now made the same incorrect assertion to this Court. (Petition, pp. 6, 15.)

The facts are, as petitioner well knows by now, that California requires a general applicant to pass both an essay examination, given only in California, and the MBE, administered in 46 states

by their respective bar examining authorities and provided and graded by Educational Testing Service. Under present policy in California an applicant need not pass both sections at one sitting, as long as both portions are passed within the same 24-month period.

Since the MBE is a standardized test given in 46 states, California, as a professional courtesy, accepts the scores of examinations administered by the bar examiners in other states. See footnote 7 of the Seventh Circuit opinion. (Petition, p. A8.) The California examination is emphatically not given in Illinois, although clearly if it wished, the Committee could refuse to permit the transfer of MBE scores and require that applicants sit for the California administration of the MBE. California's practice of accepting the transfer of a passing score according to

California standards with regard to the MBE administered in other states is similar to its acceptance of proof of college and law school graduation from schools in other states, rather than requiring all applicants to have graduated from California schools. Moreover, it would be equally senseless to assert that accepting applications from those who attended school in Illinois is a contact of respondent with Illinois; yet this is little different than its acceptance of MBE scores administered by bar examiners in other states. Petitioner has asserted that respondent, in some unspecified manner, derives benefit from law schools in other states. (Petition, pp. ii, 5.) However, clearly respondent is merely a state regulatory agency and derives absolutely no benefit from the admission of a person of any state to practice law in California.

The Seventh Circuit characterized California's acceptance of the results of the MBE given in other states as "contingent upon the unilateral act of an applicant in submitting his scores," and thus not a constitutional contact with the state of Illinois. The court also noted that petitioner himself did not take the MBE in either California or Illinois, since as an out-of-state practicing attorney he had the option of taking only the essay portion, which he failed. (Petition, p. A12 n.11.)

4. The Submission of a Bill of Costs Is Not a Contact.

Petitioner counts as a contact that a bill of costs was submitted to the court of appeals. (Petition, p. iv.) Costs were awarded to respondent on appeal (see petition, p. A20), and submission of a bill of costs pursuant to such an award is merely a normal part

of a lawsuit. At bottom, petitioner's claim essentially is that by properly asserting and successfully litigating lack of personal jurisdiction and being awarded costs on appeal, respondent has in effect by such conduct now had sufficient contact with Illinois to allow an assertion of personal jurisdiction. It is submitted that the argument is simply internally inconsistent and totally without merit.

5. The Majority of the Contacts Relied Upon by Petitioner Are Simply Unilateral Submissions from Applicants Whose Place of Residence Is Legally Irrelevant.

Petitioner lists as significant contacts with the state of Illinois: the fact that applicants have requested a certification from their law schools or state supreme court sent to respondent; that applicants from Illinois have applied to take the bar examination in California; and that along with these

applications applicants from Illinois sent the required fee;* and that applicants from Illinois have taken the California bar examination. (Petition, pp. i, ii.)

Each of these activities is unilateral on the part of the applicant and does not rise to the level of a constitutional contact under the standard of Hanson v. Denckla, 357 U.S. 253, 78 S.Ct. 1229 (1958). And see the discussion of this point in the opinion of the court below. (Petition, p. A9.)

Petitioner also lists additional contacts: that respondent sends applications to out-of-state residents in response to their request; that

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* In this context it should be noted that respondent is a public corporation which serves as the administrative arm of the California Supreme Court and does not derive profit from fees submitted with the application forms.

respondent mails back an acknowledgement of filing and other materials related to the examination, and that notice of failure is sent along with an application to take the next examination. All these items are sent only in response to an applicant's unilateral request, with the exception of the application for the next bar examination, which is enclosed for the applicant's convenience. This application is not a solicitation as petitioner claims, since respondent, as a state regulatory agency in the judicial branch of government, gains nothing by its being returned.

The state of an applicant's residence is legally irrelevant under California law. Thus application materials are sent to applicants in whatever state or country they may reside. As the Seventh Circuit noted, any communication with Illinois "is

generated by the 'unilateral activity' of persons who happen to be Illinois residents. Such activity cannot 'satisfy the requirement of contact' constitutionally required to sustain personal jurisdiction." (Petition, pp. A11-A12, quoting Hanson v. Denckla, supra, 357 U.S. at 253.)

6. More Contact with the Forum State Is Constitutionally Required to Assert Personal Jurisdiction over a Nonresident Defendant When the Contacts Are Distinct from the Alleged Merits of the Suit. In Addition, Since None of the Allegedly Unlawful Acts Occurred in Illinois, that State Has Only a De Minimus Interest in the Lawsuit.

Petitioner's complaint is founded on allegations that California unlawfully restricts entry into the legal profession in California and unfairly grades bar examinations in California. Not one act related to the alleged merits of petitioner's suit is claimed to have

occurred in Illinois, or for that matter in any state other than California.

Cases have consistently held that where the cause of action is distinct from the contacts with the forum state more contacts are required in order to constitutionally assert personal jurisdiction over a nonresident defendant:

> "If the nonresident defendant's activities within a state are 'substantial' or 'continuous and systematic,' there is a sufficient relationship between the defendant and the state to support jurisdiction even if the cause of action is unrelated to the defendant's forum activities. . . . If, however, the defendant's activities are not so pervasive as to subject him to general jurisdiction, the issue whether jurisdiction will lie turns on an evaluation of the nature and quality of the defendant's contacts in relation to the cause of action." (Emphasis added.) Data Disc, Inc. v. Systems Tech. Assoc., Inc., 557 F.2d 1280, 1287 (9th Cir. 1977).

See also Tommills Brokerage Co. v. Loeb, Rhoades & Co., 411 F.2d 764, 767 (7th Cir. 1969); Aigner v. Bell Helicopters, 86 F.R.D. 532, 536 (N.D.Ill. 1980); Staffin v. Greenberg, 509 F.Supp. 825, 831 (E.D.Pa. 1981); Jamesbury v. Kitamura Value Mfg. Co., Ltd., 484 F.Supp. 533, 536-537 (S.D.Tex. 1980).

Since none of the allegedly unlawful acts occurred in Illinois, and since even were petitioner to ultimately prevail on the merits, the only benefit would be to those who choose to reside in California. Illinois has little or no interest in the lawsuit. The court below included this lack of state interest as a factor in its minimum contacts analysis: "Moreover, that state [i.e., Illinois] has no significant interest in adjudicating the dispute." (Petition, p. A14.)

The extent of "the forum State's interest in adjudicating the dispute"

has been held a significant factor in determining whether it is fair and reasonable to subject an out-of-state defendant to personal jurisdiction. Worldwide Volkswagon Corp. v. Woodson, 444 U.S. 286, 292, 100 S.Ct. 559, 564 (1980); Standard Fittings Co. v. Sapag, S.A., 625 F.2d 630, 641 (5th Cir. 1980); Vespe Contracting Co. v. Anvan Corp., 433 F.Supp. 1226, 1235 (E.D.Pa. 1977).

C. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT PETITIONER WAS PROVIDED ALL RELEVANT INFORMATION PROPERLY REQUESTED WITH RESPECT TO THE ISSUE OF PERSONAL JURISDICTION

Petitioner several times complains that he was denied any discovery with respect to the issue of personal jurisdiction. (Petition, pp. v, xi, 2, 23-25.) This is simply not the case. In fact petitioner was afforded all

information relevant to the issue of personal jurisdiction which was properly requested.

Along with the original complaint petitioner served a set of five interrogatories. Petitioner recognized that interrogatories 1, 2 and 4 were not relevant to the issue of personal jurisdiction and at one time stipulated that no answers were required until the court had ruled on the issue of personal jurisdiction.*

Respondent then filed partial answers and objections to interrogatories 3 and 5. Interrogatory No. 3 requested the names and addresses of all Illinois residents who took the bar examination over the past ten years.

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* Petitioner later withdrew his stipulation, charging that it had been procured by the fraudulent misrepresentations of one of respondent's attorneys.

The number of those who listed Illinois addresses was provided from July 1976 (the first year records are available) to July 1980. The specific names and addresses of the individuals were not given to petitioner, on the basis that they were irrelevant to the issue of personal jurisdiction and also were confidential and involved privacy rights of those applicants.

Interrogatory No. 5 requested copies of all examination questions and model answers, copies of grading procedures, and the identity of all graders. Answers to this interrogatory were not provided, and petitioner did not seek to compel answers. In any event, it is submitted that this information is clearly irrelevant to the issue of personal jurisdiction.

Along with his opposition to respondent's motion to dismiss,

petitioner served another interrogatory, No. 6, consisting of several subparts. As the courts below noted, interrogatory No. 6 is the only one really at issue, and on close examination the information it sought is only tenuously related at best to the issue of personal jurisdiction. (See petition, pp. A15-A17, A31-A32.)

Section (a) of interrogatory No. 6 requested information on "all income derived by defendants in any way from within the State of Illinois and the sources of such income." In this connection petitioner asserted that application fees are "substantial income derived from Illinois" and that membership dues from bar members living in Illinois are "substantial monies." This ignores the fact that respondent and its Committee merely receive money in California from applicants and attorneys

required by California statute and admission rule to pay such fees in California in order, respectively, to be examined for admission to practice and to continue to be licensed to practice in California. Certainly this "activity" does not constitute a minimal constitutional contact with Illinois or with any other state or country from which such monies may have been mailed. See World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 293, 100 S.Ct. 559, 566 (1980). By this interrogatory, therefore, plaintiff in effect sought an admission as to his characterization of fees as business income rather than facts truly relevant to the issue of personal jurisdiction.

Section (b) of interrogatory No. 6 requested "the number of applicants for the California bar examination who have taken the multistate portion of the bar examination in Illinois within 21 months

of taking the essay portion, and had the grade transmitted to [respondent]" in the last ten years. Clearly this has nothing to do with constitutional contacts with Illinois, since again as a matter of law petitioner is incorrect in his assumption that by allowing the transfer of MBE grades from Illinois or other states respondent's Committee is in effect giving the MBE in Illinois or such other states. As indicated above, the MBE is given in 46 states and is prepared and graded by the Educational Testing Service in Princeton, New Jersey. In each state in which it is utilized the MBE is administered by the bar examining authority of that state, not by respondent's examining Committee.

Section (c) of interrogatory No. 6 requested the respondent to "[s]tate and describe the numbers of members of the State Bar in Illinois and with

particularity all communications for the past five years in either direction between defendant and such members, including mail, literature, notices and all other correspondence." The number of attorneys who listed an Illinois address had already been given to petitioner and correspondence is sent to whatever address is listed as a professional courtesy, so that members are not required to maintain a California address. Furthermore, California has a unified bar and all attorneys licensed to practice in California are therefore members of respondent State Bar. However, very few are employed by or act as agents for the State Bar. This interrogatory, therefore, calls in the main for information unavailable to the State Bar and totally irrelevant to the existence of constitutional contacts. Also, it was clearly burdensome, overbroad, and to the

extent it sought correspondence involving refusal of admission or disciplinary action, it sought production of privileged and confidential information.

Section (d) requested a list of "instances of any members of [respondent] State Bar traveling from Illinois to California for reasons connected with [respondent], or of agents of [respondent] traveling to Illinois for any reasons." Section (e) requested "all mail and telephone communications between [respondent] and within Illinois not included in other interrogatories." Both these sections are at the very least vague and overbroad since they do not limit themselves to official acts. They include personal travel and communication, travel by attorneys who are merely members of the respondent, and communication unrelated to constitutional contacts within the state of

Illinois. Records for much of this information never existed. A complete answer to these questions would have been a voluminous list of activities irrelevant to the issue of personal jurisdiction.

It is submitted that the lower courts correctly rejected petitioner's contention that answers to interrogatory No. 6 would strengthen his case. As the district court stated: "The Discovery requests are only tenuously related to Wein's claims, and would not establish voluntary acts by defendants directly or indirectly within Illinois . . . " (Emphasis in original.) See petition, p. A32. And the court of appeals upheld this determination, concluding that in light of its analysis of the issue of personal jurisdiction, there was no abuse of discretion in the district court's refusal to compel answers to

interrogatory No. 6. See petition, pp. A15-A17.

## III

## CONCLUSION

It is submitted that the courts below properly applied the minimum contacts analysis of International Shoe and its progeny since petitioner opted to attempt to effect service as to his alleged diversity and nondiversity causes of action only pursuant to the Illinois long arm statute. It is further submitted that applying such standard, the courts below correctly concluded that such minimum contacts were lacking. Certainly respondent (the State Bar of California and its Committee of Bar Examiners) did not purposely avail itself of the privilege of conducting activities within Illinois and thereby invoke the benefit and protection of its laws. And most emphatically respondent

had no reasonable expectation of being haled into court in Illinois, especially by one who was a California resident at the time he took the California bar examination about which he complains.

Petitioner has failed to demonstrate either that there is a conflict among the decisions of the federal courts of appeals or that the court below decided a federal question in a way in conflict with applicable decisions of this Court. Having failed to demonstrate special and important reasons for granting the writ as required by this Court's Rule 17, petitioner's petition for writ of certiorari should be denied.

Dated: December 1, 1982

Respectfully submitted,

HERBERT M. ROSENTHAL
ROBERT M. SWEET

By ROBERT M. SWEET

Attorneys for Respondent

# United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Argued: June 14, 1982

JUNE 29, 19 82

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

Before

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

FREDERICK A. WEIN, individually and as a representative of a class of others similarly situated,
Plaintiff-Appellant,

No. 81-2708 vs.

COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA and THE STATE BAR OF CALIFORNIA,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81-C-1312
Edwin A. Robson, Judge.

## ORDER

This is an appeal from the district court's dismissal of the plaintiff's complaint because of lack of personal jurisdiction over the defendants. For the reasons stated below, we affirm that judgment.

I.

The plaintiff, Frederick A. Wein, is an Illinois attorney who in July 1980 took but failed the attorney's examination for admission to the State Bar of California.1/ On March 10, 1981, he filed this action in the Northern District of Illinois in an

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1/ California makes available two methods for gaining admission to the practice of law: (1) an "attorney's examination," consisting primarily of essay questions, which may be taken by persons admitted to practice in other jurisdictions; and (2) a "general examination," consisting of both essay and Multistate Bar Examination sections, which is available to all qualified applicants.

attempt to challenge the legality of the grading of that examination. Summons were served on the defendants in California by a federal marshal. On May 13, the defendants moved to dismiss the action, arguing that the court lacked personal jurisdiction over them, and that the plaintiff's complaint was deficient in form. In response, the district court entered an order in which it: (1) dismissed the plaintiff's complaint for failure to comply with Fed. R. Civ. P. 8, 9, 10, and 23;2/ (2) reserved ruling on the defendants' jurisdictional objection, granting the plaintiff 20 days to file an amended complaint; and (3) stayed all discovery.3/

On May 29, the plaintiff filed an amended pleading. In it he alleged that the defendants maintain an artificially low passing rate for the attorney's examination in order to restrict the number of attorneys practicing in California and to force persons to retake the examination. He urged that these allegations grounded causes of action under the federal antitrust laws, constitutional and statutory civil rights provisions, and state contract and tort law. In addition, he asserted that personal jurisdiction over the defendants was established under Fed. R. Civ. P. 4(e) and Illinois' long-arm statute, Ill. Rev. Stat. ch. 110, pars. 16, 17, and 18.

On July 27, 1981, the court, renewing its consideration of the defendants' prior objection, entered an order dismissing the action for lack of personal jurisdiction. The plaintiff moved to amend that order under Fed. R. Civ. P. 59, requesting the court to transfer the case to an appropriate district under 28 U.S.C. § 1406(a). The court denied that motion. This appeal follows.

II.

The plaintiff raises three relevant claims before this court: (1) that the district court erred by dismissing this action for lack of personal jurisdiction over the defendants; (2) that the court erred by denying him an opportunity to pursue discovery concerning certain contacts between the defendants and the forum state; and (3) that the court abused its discretion by refusing to transfer this case to an appropriate district under 28 U.S.C. § 1406(a).4/ We consider these in turn.

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2/ The plaintiff attempted to frame his suit as a class action.

3/ Following the defendants' motion, the plaintiff had served on them interrogatories inquiring into their relationship with the state of Illinois.

4/ Because this appeal is from a dismissal for lack of personal jurisdiction, the remaining issues raised in the plaintiff's brief, e.g., subject matter jurisdiction, sufficiency of his claims, etc., are not properly before this court.

A. Personal Jurisdiction

The plaintiff argues that jurisdiction over the defendants was established under Illinois' long-arm statute, applicable to this federal suit by virtue of Fed. R. Civ. P. 4(e).5/ Because that statute "reflect[s] a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause," Fisons Limited v. United States, 458 F.2d 1241, 1250 (7th Cir.), cert. denied, 405 U.S. 1041 (1972), see Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957), an evaluation of the plaintiff's attempt to utilize it in this context must be guided by the "due process" standards articulated by the Supreme Court in International Shoe Co. v. Washington, 326 U.S. 310 (1945) and its progeny.6/

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5/ Although the plaintiff incorporated an antitrust claim in his complaint, at oral argument he expressly disavowed any reliance on the nationwide service provision of the Clayton Act, 15 U.S.C. § 22, as a means for establishing personal jurisdiction over the defendants. Thus we limit our discussion to the state long-arm statute. See Advisory Committee Notes to Fed. R. Civ. P. 4(e) ("If the circumstances of a particular case satisfy the applicable Federal law . . . and the applicable State law . . . , the party seeking to make the service may proceed under the Federal or the State law, at his option.").

6/ Although the Supreme Court's major pronouncements in this area have all arisen in the context of assertions of power by state courts, i.e. McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Hanson v. Denckla, 357 U.S. 235 (1958); Shaffer v. Heitner, 433 U.S. 186 (1977); Kulko v. Superior Court of California, 436 U.S. 84 (1978); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), we have applied an International Shoe analysis in both diversity cases, see e.g. Biltmoor Moving and Storage Co. v. Shell Oil Co., 606 F.2d 202, 206 (7th Cir. 1979); Hutter Northern Trust v. Door County Chamber of Commerce, 403 F.2d 481, 484 (7th Cir. 1968), and federal question cases, see Illinois v. City of Milwaukee, 599 F.2d 151, 156 n.3 (7th Cir. 1979), vacated on other grounds, 451 U.S. 304 (1981); Honeywell v. Metz Apparatewerke, 509 F.2d 1137, 1143 (7th Cir. 1975), when a state long-arm statute was used as the means for effecting service of process. Recently, in his concurring opinion in Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, 50 U.S.L.W. 4553 (U.S. June 1, 1982), Justice Powell suggested that such an approach is proper. See id. at 4558 (When a federal district court depends on the law of a state to establish personal jurisdiction, "its jurisdiction . . . normally would be subject to the same due process limitations as a state court.").

The fundamental teaching in this area is that:

> due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id. at 316. The focus for measuring those factors is the "relationship among the defendant, the forum, and the litigation." Shaffer v. Heitner, 433 U.S. 186, 204 (1977). Based on that relationship, we must determine "whether the 'quality and nature' of the defendant[s'] activity is such that it is 'reasonable' and 'fair'" to require them to defend against the plaintiff's charges in the Northern District of Illinois. Kulko v. Superior Court of California, 436 U.S. 84, 92 (1978). That determination necessarily depends upon the particular factual contours of this case. Id.

The plaintiff alleges a variety of "contacts" between the defendants and the state of Illinois. Essentially these fall into three categories: (1) the interaction of the defendants with Illinois residents who apply for admission to the California bar (this includes exchanges of information between the parties; submissions of forms, fees, and certifications of education by Illinois residents; notification of test results; and provision of further application forms for Illinois residents who fail an examination); (2) the defendants' use in certain circumstances of the results of Multistate Bar Examinations taken in Illinois,7/ and (3) the fact that there are members of the State Bar of California who reside in Illinois and who receive the association's publications there.8/

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7/ The defendants allow applicants for the "general examination" to transfer their scores from recent MBE's taken in other jurisdictions rather than requiring them to retake the examination.

8/ Prior to oral argument, the plaintiff filed a "Motion to Supplement the Record on Appeal, and Motion to Compel Discovery from Defendant or in the Alternative to Compel Discovery by Subpoena to Third Parties," in which he alleged two additional "contacts": (1) that California bar examiners attend a National Conference of Bar Examiner's seminar held in Chicago every two years; and (2) that the State Bar of California obtains information on the character and fitness of out-of-state applicants from the National Conference of Bar Examiners, which is headquartered in Chicago. The defendants did not respond to this motion. At argument, we indicated that we would consider this motion with the case. We now grant the motion to supplement to the extent that we consider the plaintiff's additional allegations. We deny the discovery requests.

Appendix

An essential criterion for establishing the reasonableness of subjecting a nonresident defendant to litigation is "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958); see Kulko v. Superior Court of California, 436 U.S. at 96; Lakeside Bridge & Steel v. Mountain State Construction, 597 F.2d 596, 600-01 (7th Cir. 1979), cert. denied, 445 U.S. 907 (1980). The "contacts" alleged by the plaintiff do not satisfy this requirement. Although they illustrate some factual connection between the defendants and Illinois residents, they do not demonstrate any purposeful activity through which the defendants have availed themselves of the "benefits of conducting business in the forum."9/

This conclusion is consistent with that reached by the Fifth Circuit in Burstein v. State Bar of California, 659 F.2d 670 (5th Cir. 1981), withdrawn pending rehearing, 668 F.2d 795 (1982), a case similar to ours, in which an individual who took but failed the California bar examination attempted to sue the State Bar of California in the Eastern District of Louisiana.10/ In Burstein the plaintiff focused on (1) the interaction of the defendant with Louisiana residents who apply for admission to the California bar and (2) the fact that some California bar members reside in Louisiana as the relevant "contacts." The court concluded that these were not sufficient "affiliating circumstances" to ground personal jurisdiction, noting:

> The State Bar of California does not avail itself of any Louisiana privileges or services. It does not solicit potential

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9/ We note that in his reply brief the plaintiff, characterizing the defendants as a "state agency," also attempts to rely on more general contacts between the state of California and the state of Illinois as the basis for the court's jurisdiction. (Reply Brief at 2-3.) We reject this argument. The State Bar of California is a public corporation. Cal. Const. art. VI, § 9; Cal. Bus. & Prof. Code § 6001. (The Committee of Bar Examiners in turn is established by the board of the State Bar. Cal. Bus. & Prof. Code § 6046.) The State Bar, as an entity, is expressly amenable to suit. Cal. Bus. & Prof. Code § 6001. Clearly that entity--not the state--is the focus of the plaintiff's allegations. Accordingly, the plaintiff must demonstrate that the entity which it can and is attempting to sue has "minimum contacts" with the forum.

10/ Although the original panel opinion in this case has been withdrawn, we believe that the "minimum contacts" analysis of the facts of that case was sound.

> members in this or any state. Those who wish to sit for its examination take it upon themselves to apply to do so, and the State Bar, as a convenience to such persons, mails the necessary materials to the address given by these applicants. Similarly, the State Bar mails certain materials to members regardless of their place of residence rather than attempting to require that all its members maintain California mailing addresses.

Id. at 674 (quoting Burstein v. State Bar of California, 503 F. Supp. 227, 229 (E.D. La. 1980)). This assessment is equally applicable to the case before us. To the extent that there is any relationship between the present defendants and the state of Illinois, it is generated by the "unilateral activity" of persons who happen to be Illinois residents. Such activity cannot "satisfy the requirement of contact" constitutionally required to sustain personal jurisdiction. Hanson v. Denckla, 357 U.S. at 253; see Jadair, Inc. v. Walt Keeler Co., No. 81-1380, slip op. at 6-7 (7th Cir. May 26, 1982).11/

The plaintiff resists this conclusion by relying on a number of cases in which personal jurisdiction has been successfully asserted over a nonresident defendant. E.g., Great Western United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), rev'd sub nom. Leroy v. Great Western United Corp., 443 U.S. 173 (1979); Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974); Fisons Limited v. United States, supra; Electro-Craft Corp. v. Maxwell Electronics Corp., 417 F.2d 365

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11/ We recognize that Burstein did not involve an allegation that the defendant used results of MBE's administered in the forum state. Yet we do not find Wein's assertion to that effect sufficient to bridge the gap between the defendants and the state of Illinois. California's use of such examination results is contingent upon the unilateral act of an applicant in submitting his scores. Further, this practice has no effect on the applicant's standing or the defendant's activities in the forum. Finally, we note that Wein himself did not utilize this procedure nor are his substantive allegations in any way tied to the MBE.

We also do not find the plaintiffs belated allegations that California bar examiners attend meetings in Chicago and that the defendants have some dealings with the Chicago-based National Conference of Bar Examiners to be sufficient to satisfy this requirement. This type of sporadic and fortuitous interaction does not implicate the defendants, in any significant way, in activity that is subject to the "benefits and protections" of the laws of the forum state. See Turner v. Jack Tar Grand Bahama, Ltd., 353 F.2d 954, 956 (5th Cir. 1965).

(8th Cir. 1969). These cases, however, are inapposite. In each of them the defendant either exerted significant control in the forum state (Fison), produced substantial effects on business in the forum (Great Western), or reasonably anticipated that a contract to which it was party would have direct consequences in the forum (Cousteau, Electro-Craft). Each of these defendants had some articulable stake in the laws of the forum for enforcement or protection.

In the present case there is no such connection. The defendants have not purposely availed themselves of any privilege of the forum state. Moreover, that state has no significant interest in adjudicating this dispute. See McGee v. International Life Ins. Co., 355 U.S. 220 (1957). Thus "basic considerations of fairness" dictate that the defendants could not "reasonably have anticipated being 'haled before [an Illinois] court '" Kulko v. Superior Court of California, 436 U.S. at 97-98 (citation omitted); see World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); Burstein v. State Bar of California, 659 F.2d at 675. The limits of due process would have been transgressed had the court attempted to exert power over the defendants by means of Illinois' long-arm statute. Thus the court's rejection of this jurisdictional base was proper.

B. Discovery

Apart from his substantive jurisdictional argument, Wein also contends that the district court erred by dismissing his action without permitting him to pursue discovery concerning certain contacts between the defendants and the state of Illinois.12/

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12/ As explained by the district court, Wein sought information on:

> 1) all income derived by defendant in any way from the state of Illinois, including but not limited to application fee[s] from Illinois residents; 2) the number of applicants for the California Bar exam who have utilized multistate (MBE) scores from examinations taken in Illinois, both at the time Wein took the test and for the past ten years; 3) all communications between the Bar and California Bar members who are Illinois residents; [and] 4) all trips or communications sent to or received from Illinois for the past five years by any member of the California bar which [sic] was connected with the State Bar.

Although discovery concerning factual issues raised by a motion to dismiss for lack of personal jurisdiction may be appropriate in certain cases, a district court is vested with broad discretion in controlling such inquiries. Chrysler Corp. v. Pedders Corp., 643 F.2d 1229, 1240 (6th Cir), cert. denied, 102 S.Ct. 386 (1981); Budde v. Ling-Temco-Vought, Inc., 511 F.2d 1033, 1035 (10th Cir. 1975). "A ruling by the trial court . . . denying discovery will not be cause for reversal unless an abuse of discretion is found." Chrysler Corp. v. Pedders Corp., 643 F.2d at 1240 (citing H. L. Moore Drug Exch., Inc. v. Smith, Kline and French Laboratories, 384 F.2d 97 (2d Cir. 1967)).

In this case the district court concluded that the information sought by Wein was "only tenuously related to [his] claims, and would not establish voluntary acts by defendants directly or indirectly within Illinois." In effect the court found that the proposed discovery would not be useful to remedy the jurisdictional defect. In light of our analysis of the question of personal jurisdiction, we find no abuse of discretion in the court's treatment of the plaintiff's request. Id.; see Burstein v. State Bar of California, 659 F.2d at 675.

C. Transfer under 28 U.S.C. § 1406

The plaintiff's final argument is that the district court erred by dismissing this case rather than transferring it pursuant to 28 U.S.C. § 1406(a) to a district "in which it could have been brought." Although section 1406(a) is "broad enough to authorize the transfer of [a case], . . . whether the court in which it was filed had personal jurisdiction over the defendants or not," Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466 (1962), such a transfer must be "in the interest of justice." A district court has broad discretion to decide if that criterion is met. Brown v. Grimm, 624 F.2d 58 (7th Cir. 1980); De La Fuente v. I.C.C., 451 F. Supp. 867, 872 (N.D. Ill. 1978).

In this case the district court refused to authorize a transfer because: (1) the plaintiff did not affirmatively show that he was barred from refiling his complaint in a proper forum; (2) the action was not substantially advanced prior to dismissal; and (3) the plaintiff never identified which district should receive the case. Based on these factors, the court acted within its discretion in denying the plaintiff's request. See Brown v. Grimm, supra; Lowery v. Estelle, 533 F.2d 265 (5th Cir. 1976) (dismissal does not bar refiling in proper forum).

III.

For the foregoing reasons, the judgment of the district court is affirmed.

Appendix